No. 2502.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Appellant,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS, JOSEPH CRAIG and YOLO WATER AND POWER COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANT.

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Of Counsel.

Filed this.....day of March, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

THE JAMES H. BARRY CO

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STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

Appellant is a citizen of Arizona. The appellees are all citizens of California. The court below was of

opinion that the suit was brought to recover upon a *chose in action,* and that as appellant's assignor was a citizen of California, the Court was without jurisdiction under Section 24 of the Judicial Code (Tr., pp. 22-23).

The facts are as follows:

On the 30th day of November, 1908, Central Counties Land Company was the owner and in possession of certain lands (Tr., pp. 2-3).

On that day it borrowed two sums aggregating $3,000 from appellee L. D. Stephens (Tr., p. 4).

Contemporaneously and as part of the same transaction, and solely for the purpose of securing the repayment of these sums, said Central Counties Land Company executed and delivered to said Stephens a written instrument in form a deed of said properties (Tr., pp. 4-5).

It is alleged that said Stephens executed a defeasance to said Central Counties Land Company dated the same day. In this document Stephens undertakes to reconvey the property to the mortgagor within seven months, upon condition that the mortgagor pay the sum of $3,000 "together with a sum equal to interest on the said $3,000 from the date of this agreement until the time of said payment." In other words, the amount to be paid was the identical sum loaned, with interest (Tr., p. 10).

The grantor notwithstanding the execution of the

deed in form, continued to occupy and possess the property (Tr., p. 12).

Stephens on December 18, 1911, executed a purported deed of the lands to appellees J. L. Stephens and Joseph Craig (Tr., p. 13).

Said Stephens and Craig thereafter executed a purported deed to appellee Yolo Water and Power Company (Tr., p. 14).

All of the said grantees took with actual knowledge that the deed absolute in form from the Central Counties Land Company to L. D. Stephens "was and is a mortgage" (Tr., pp. 13-14).

Appellee Adamson, who was the tenant of the mortgagor from November 1st, 1910, on, has been in possession of said lands at all times. He has never surrendered up the possession to his lessor, but while so continuing on in possession has ever since November 30, 1911, attempted to attorn to appellee Yolo Water and Power Company, and claims now to be in possession for the latter company (Tr., pp. 12-15-16).

Appellant is the lawful owner of the lands as successor in interest of said Central Counties Land Co. (Tr., p. 17).

The prayer asks that the deed from the Central Counties Land Company to appellee L. D. Stephens be adjudged to be a mortgage; also for a discovery to ascertain the ownership of the mortgage debt; also for an accounting of the rents and profits, and for the removal of the several clouds upon appellant's title

created by said several purported transfers of the title (Tr., p. 18).

In a memorandum decision the learned judge of the court below declared that the principles applicable to this case are the same as the Court had applied in the case of *Power and Irrigation Co. of Clear Lake* v. *Capay Ditch Company* (No. 14 below; No. 2500 here on appeal), and that for the reasons given in that case, the bill here must be dismissed for want of jurisdiction (Tr., p. 22).

THE BRIEF FILED BY APPELLANT IN APPEAL NO. 2500 COVERS ALL OF THE QUESTIONS OF LAW INVOLVED ON THIS APPEAL.

As the questions involved are fully discussed in our brief in No. 2500—which is here on appeal and is to be heard by the Court along with this appeal,—we respectfully refer the Court to said brief for a full discussion of the law applicable here. The following synopsis will serve to point to the propositions which establish the jurisdiction of the District Court in this cause, and make it clear that the conclusions of the learned judge below are erroneous.

The point is, that the suit is not brought by an assignee to recover upon a chose in action, but by the grantee of real property to remove a cloud from his title. The steps by which this conclusion is reached are as follows:

First: The deed having been given merely as security was a mortgage, no matter what its terms.

"If the deed was intended merely as a security for the payment of a debt, it is a mortgage, 'no matter how strong the *language of the deed or any instrument accompanying it might be.*' (*Woods* v. *Jansen,* 130 Cal., 200.)"

Todd v. *Todd,* 164 Cal., 255, 257.

"But conceding that the contract bears no visible earmarks of a mortgage, still, if the fact be, as the complaint alleges and the demurrer admits, that it was entered into for the purpose of securing to defendant the payment of the balance then due to it, *no form of words, however adroitly used to conceal this purpose,* can estop plaintiff from pleading and proving the fact. As was said in *Russell* v. *Southard,* 12 How., 139: 'To insist on what was really a mortgage, as a sale, is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.' It is settled beyond controversy that though a deed be absolute in form, yet if in fact it be intended by the parties to it *as security for the payment of money* or the performance of any lawful act, *it is a mortgage;* and we know of no principle of estoppel which can be invoked to prevent the fact from being disclosed. It is the real character, not the form, of the instrument to which the Court will look."

Peninsula, etc., Co. v. *Pacific S. W. Co.,* 123 Cal., 689, 694.

Second: The defeasance or contract, no matter what its terms, does not change the character of the deed.

The point is, that the allegation of the bill that the deed was given solely as security for the money loaned is conclusive on demurrer as to the legal effect of the instrument. That allegation stamps the deed as a mortgage both in fact and in law, and we need not

concern ourselves with the language employed in either the deed or the defeasance.

The following quotation illustrates this:

> "The complaint distinctly alleges that the agreement of March 15, 1893, was intended as security for the debt then due; and whether that was its real purpose, or whether the object was to establish different relations between the parties, such as vendor and purchaser, is a question of fact which plaintiff under the allegations of the complaint, is entitled to have tried as an issue of fact upon answer."

Peninsula, etc. Co. v. *Pacific S. W. Co., supra.*

Third: **Being, therefore, a mortgage, it must be noted that in California no title passes by it.**

See Civil Code of California, Section 2888, and cases cited in brief in Appeal No. 2500, submitted herewith.

Fourth: **The cause of action here sued on accrued prior to January 1, 1912, and the jurisdiction is to be determined by the Judiciary Acts of 1887-8, and not by Sec. 24 of the present code.**

McKernan v. *North River Ins. Co.,* 206 Fed., 984;
Wells v. *Russellville, etc. Co.,* 206 Fed., 528;
Dallyn v. *Brady,* 197 Fed., 494;
M. K. & T. Ry. Co. v. *Chappell,* 206 Fed., 697;
Cady v. *Barnes,* 208 Fed., 361.

This point is of importance only in the event that the phrase "chose in action" in the Judicial Code is

given an enlarged meaning so as to include actions by grantees to remove clouds from title—the latter not being included in the acts of 1887-8. But we maintain that the meaning of the earlier statute has not been changed by the Judicial Code.

Fifth: The Acts of 1887-8 which prohibit the Federal Court from taking jurisdiction of suits by assignees to recover on any promissory note or other chose in action, has no reference to a suit by the grantee of lands to remove a cloud from his title.

It was said in *Sheldon* v. *Sill,* 8 How., 449, 450:

> "The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. The term 'chose in action' is one of comprehensive import . . . *It is true, a deed of title for land does not come within this description.*"

The Court in *Dundas* v. *Bowler,* 8 Fed. Cas., 28, 29, said:

> "A conveyance of land is not a chose in action . . . That the statute acts upon negotiable paper is clear . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.*"

> "The conveyance by the marshal under the receivership proceedings and the order of the Court was a conveyance of the entire interest in the plant and franchise—as well that of the defendant the Portage City Waterworks Company as that of the bondholders—and can hardly be considered merely as an assignment of the original contract under which the plant was erected. *It was a conveyance of*

real estate. . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."

Portage City Water Co. v. *City of Portage,* 102 Fed., 769, 774.

See also *Gest* v. *Packwood,* 39 Fed., 525.

We therefore have in this case neither a chose in action nor an assignee of a chose in action. Our suit is not by an assignee at all—let alone "by an assignee to recover upon the contents of a chose in action" for as shown under the next sub-head the bill is to remove a cloud from an owner's title.

Sixth: This bill to redeem is in reality a bill to remove a cloud from title. Such a bill is not a suit to recover upon a chose in action.

The Code of Civil Procedure of California, Section 346, denominates such a suit an "action to redeem a mortgage."

But the courts of California have pointed out that the lien of the mortgage—whether such mortgage be in the usual form or in the form of a deed absolute—is *extinguished* by lapse of time, and that although called by the Code an "action to redeem a mortgage,"

such an action is in fact a suit to remove a cloud from title.

See:

Baynor v. *Drew,* 72 Cal., 308;
Baker v. *Fireman's Fund Ins. Co.,* 79 Cal., 42;
Hall v. *Arnott,* 80 Cal., 348.

In the case at bar no promissory note was given for the money borrowed. The contract or defeasance calls for a "repurchase" within seven months. Even if this be taken to indicate when the debt fell due, the statute of limitations had run on the debt when the suit was brought. The lien of the mortgage was therefore extinguished (*Raynor* v. *Drew,* 72 Cal., 308), and the facts bring the case directly within the foregoing authorities.

CONCLUSION.

If the owner of land finds his title encumbered by a mortgage of record which has never been paid off, but the lien of which has been extinguished by the lapse of time, he may have the cloud created by the mortgage removed upon doing equity by paying off the mortgage.

This rule applies whether the mortgage is by deed absolute in form or otherwise.

The right of the landowner in such a case is not a

chose in action, and if the requisite citizenship exists, the Federal courts have jurisdiction.

Respectfully submitted.

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